Kentucky Department of Insurance

Medical Malpractice Insurance Recommendations

January 7, 2003

The medical malpractice insurance market in Kentucky continues to harden. While an adequate number of carriers are offering coverage, the cost has increased and finding coverage is requiring additional effort on the part of providers. In addition, underwriting has become stricter with companies looking much more closely at the risk being assumed. Providers, particularly those in high-risk specialties such as obstetrics/gynecology, neurosurgery and emergency medicine, as well as those with past claims history, are reporting large premium increases.

Following months of study, the Department of Insurance (DOI) is announcing an immediate course of action and a three-part recommendation for consideration.

Immediate Action

Effective January 15, 2003, all companies writing medical malpractice coverage in Kentucky will be required to file their rates with the Department. This is known as "designating" the line.

This will not add an undue burden of regulatory constraints to companies and will not interfere with competition or participation in the marketplace.

Rates for designated commercial lines are required to be filed within 15 days after the first use. However, if there is a change of more than 25 percent from the then-existing rates for any classification of risks in any rating territory within a 12-month period, the rates must be filed for prior approval before being used. In order to receive approval, a carrier will need to submit actuarial justification of rate need. If this justification is provided, approval will be granted.

This move will allow for closer monitoring of the market by DOI to assure that rates are justified by insurers' costs, claims and other expenses. In addition, improvements will be made to reporting mechanisms to produce more accurate, useable data regarding medical malpractice claims and costs.

A copy of the Commissioner's order to designate the medical malpractice insurance line is available upon request or on the DOI website (**insurance.ky.gov**).

Recommendations

1. Create a mandatory pre-litigation medical screening panel for each claimant.

The panel will provide both plaintiffs and defendants access to independent, professional experts to determine if the injury resulted from actions of medical negligence. The goal is to provide an independent review of facts earlier in the process that will identify claims of medical negligence that have caused injury and merit compensation. Claims that are without merit then may be withdrawn or dismissed before an extensive amount of legal fees or costs have been incurred by either party. Claims that should be resolved with settlement will be identified earlier and more attention and time may then be given to appropriate claim resolution.

Trial court dockets are crowded and this will help move those cases along more quickly outside that overburdened process when possible. It is recognized, however, that there will be some cases that will not be resolved through this panel and will need to be litigated.

Specific components of the panel:

- The process would be administered by the Administrative Office of the Courts or another designated agency with appropriate expertise. The panel would consist of one attorney as chair and three healthcare providers. The chair would be agreed upon by both parties. Each side would choose one provider and those two would

then select the third. Two of the providers must be of the same specialty as the defendant. Two additional providers may be selected in cases of multiple defendants, such as if a facility, as well as individual providers, is involved.

- The panel will review written evidence consisting of medical records, including but not limited to charts, x-rays and test results, as well as depositions of parties and witnesses.
- The panel will not have jurisdiction to decide dispositive legal affirmative defenses (such as statute of limitations defense or other grounds for dismissal) and comparative negligence unless agreed by the parties.
- The panel will report one of the following:
    - The evidence supports the conclusion that the defendant(s) failed to comply with the appropriate standard of care as charged in the complaint;
    - The evidence does not support the conclusion that the defendant(s) failed to meet the applicable standard of care as charged in the complaint;
    - There is material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury; or
    - The conduct complained of was or was not a factor of the resultant damages. If so, the panel should also report whether the plaintiff suffered:
        - any disability and the extent and duration of the disability, and
        - any permanent impairment and the percentage of the impairment.
- Findings are admissible in a subsequent court action. Failure to cooperate and participate in the panel process may result in dismissal of the action or other sanctions.

2. Establish consumer safeguards on fees an attorney may receive from a medical malpractice award.

The proposal provides for "fair and reasonable" attorney fees for both plaintiff and defense to assure that maximum amounts paid by the system flow to the injured person and their family. This assures also that attorneys still will be willing to take these cases and provide their expert assistance when needed. Some of these provisions are current practice for some members of the bar.

Some specific components of the consumer safeguards:

- Contingency fees would be limited to 33 1/3 percent of the first $1 million net recovery and 20 percent of the excess unless liability is stipulated very early in the claim process. (Net recovery means gross award less disbursements and costs, amounts previously paid by defendants or their insurers, amounts awarded for future medical expenses in excess of $25,000, and amounts of medicals owed or subrogated. However, 20 percent contingency fee may be taken on amounts recovered for subrogating medical insurers.) In such case, the fee would be limited to 25 percent of the first $1 million. These limitations would apply whether a case is resolved by settlement, dispute resolution, or trial. Provision would be made for approval of higher fees if extraordinary services are provided and justified to the court. Amounts to be paid in future installments would be reduced to their present value if the contingent attorney fee is to be paid in a lump sum.
- Contingency fees would be reduced if the net recovery, less the fee, is less than the total amount of the unpaid incurred medical expenses.

3. Develop a continuing education effort to assist providers in reducing the incidence of malpractice.

The Kentucky Medical Association (KMA) and the Kentucky Board of Medical Licensure (KBML), as well as the University of Kentucky and University of Louisville medical schools, professional provider associations, medical oversight boards and insurers, would develop continuing medical educational initiatives to assist providers in lowering the incidence of malpractice and malpractice claims. These entities would report annually to the Kentucky General Assembly on the progress of these initiatives.

The costs of being involved in a medical professional liability claim are significant. A medical provider's attention and time are diverted from current patients. There is personal mental stress, ongoing effects on a provider's "permanent record" with credentialing entities, insurers and the National Practitioner Data Bank, not to mention the effect on a provider's reputation in the community with news releases and a potential trial, regardless of the merits or ultimate outcome of the claim.

Claims do not always result from medical negligence but often from communication errors and issues of patient dissatisfaction with less than perfect results. Patient dissatisfaction often begins with poor communication, unreasonable expectations and a lack of understanding about one's own care.

For example, continuing medical education initiatives could include the development of risk management tools such as computer interfaces to monitor drugs for interactions and recommended dosages, which can speed delivery of drugs to the patient in a hospital